

NA 94-0021-CR 1 H/H USA v Talbot [2]
Judge David F. Hamilton

Signed on 01/04/07

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	CAUSE NO. NA 94-21-CR-H/H
)	
RICHARD DALE TALBOTT,)	
)	
Defendant.)	

ENTRY ON MOTION FOR RESENTENCING

Defendant Richard Dale Talbott filed on February 16, 2006 a motion for resentencing. The United States has responded, and defendant filed a reply. As explained below, defendant's motion must be denied.

Background

On December 13, 1994, Talbott was charged in an indictment with two felon in possession offenses. Count One charged him with being a felon in possession of a firearm, in violation of 18 U.S.C. §§ 922(g) and 924(e). Count Two charged him with being a felon in possession of ammunition a few days after the firearm possession, in violation of 18 U.S.C. §§ 922(g) and 924(e). A jury found Talbott guilty on both counts.

Talbott was sentenced on June 9, 1995. The court applied the 1994 version of the Sentencing Guidelines. Pursuant to USSG § 3D1.2(a) the counts were grouped. (The guideline calculations were set forth in the Presentence Report). Talbott's base offense level was 24 pursuant to USSG § 2K2.1(a)(2). Four points were added to the base offense level under USSG § 2K2.1(b)(5), because Talbott used the firearm in connection with another felony offense. Because Talbott had three prior felony convictions and the instant offense was a conviction for 18 U.S.C. § 922(g), Talbott was an armed career criminal within the meaning of USSG § 4B1.4. The offense level determined under USSG § 4B1.4 was 34. Talbott's criminal history category was VI, resulting in a guideline range of 262 to 327 months of imprisonment. He was sentenced to 327 months in prison.

On March 8, 1996, the Seventh Circuit Court of Appeals affirmed the conviction on Count Two for possession of ammunition, reversed the conviction on Count One for possession of a firearm, vacated the sentence, and remanded the case for further proceedings. *United States v. Talbott*, 78 F.3d 1183 (7th Cir. 1996), overruled in relevant part, *Dixon v. United States*, 548 U.S. —, 126 S. Ct. 2437, 2440 n.1 (2006). Before the resentencing, the United States dismissed Count One of the indictment. On July 3, 1996, Talbott was resentenced on Count Two of the indictment as an armed career criminal at offense level 33 under USSG § 4B1.4(b)(3)(B). Talbott was resentenced to 264 months in prison.¹

¹Talbott benefitted from a view of the law that the Supreme Court later rejected. In his first appeal, Talbott argued that this court erred by instructing the
(continued...)

Talbott then filed a second appeal, arguing that he should not have been sentenced as an armed career criminal because he did not have three distinct convictions for violent felonies. On February 13, 1997, the Seventh Circuit Court of Appeals affirmed the second sentencing judgment. *United States v. Talbott*, 107 F.3d 874 (7th Cir. 1997) (unpublished mem.).

Talbott has moved for a reduced sentence pursuant to 18 U.S.C. § 3582(c)(2).

Discussion

Talbott argues that his sentence should be modified for two reasons. First, he contends that Amendment 591 of the Sentencing Guidelines applies. Second, he contends there was insufficient evidence to establish that he was an armed career criminal under 18 U.S.C. § 924(e). The first argument is also based on whether the courts have assessed Talbott's criminal history correctly in sentencing him as an armed career criminal.

¹(...continued)
jury that he bore the burden of proving by a preponderance of the evidence his defense that he acted out of self-defense or "necessity" when he took possession of the rifle that was the subject of Count One. The Seventh Circuit agreed with Talbott and reversed the conviction on Count One, holding that the government had the burden of negating the defenses beyond a reasonable doubt. 78 F.3d at 1186. In *Dixon v. United States*, the Supreme Court resolved a conflict between the circuits on the burden of proof issue and approved the approach that this court applied in the original jury instructions. 126 S. Ct. at 2447-48. At this late date, of course, it is too late to reinstate the original jury verdict on Count One.

Under 18 U.S.C. § 3582(c)(2), a district court has discretion to reduce the term of imprisonment of an already incarcerated defendant when that defendant was sentenced based on a sentencing range that was subsequently lowered by the Sentencing Commission pursuant to 28 U.S.C. § 994(o). *United States v. Bravo*, 203 F.3d 778, 780 (11th Cir. 2000). However, § 3582(c) does not grant the district court jurisdiction to reconsider all original sentencing determinations. *Id.* at 781-82. The question is whether the Sentencing Commission later amended the Sentencing Guidelines in a manner that reduced the guideline range applicable to the defendant, and whether the reduction is consistent with the Sentencing Commission's policy statements. (Such a reduction is consistent with the Sentencing Commission's policy statements if and only if the Commission has actually declared an applicable amendment retroactive. See 18 U.S.C. § 3582(c) (2); USSG § 1B1.10(a).

The Commission declared Amendment 591 to be retroactive, but the problem is that it has no application to Talbott and his sentence as an armed career criminal under USSG § 4B1.4. See *United States v. Bentley*, 2006 WL 83121 (D. Kan. Jan. 11, 2006); *United States v. McCullough*, 2005 WL 2180147 (D. Neb. Sept. 7, 2005).

Talbott's further challenge to his sentence is likewise misplaced, because the record shows his criminal history was sufficient for sentencing as an armed career criminal within the meaning of USSG § 4B1.4. That question has been

decided conclusively. The Seventh Circuit wrote in his first appeal: “Talbot has a long criminal record, and the government asked the judge to sentence him as an armed career criminal under 18 U.S.C. § 924(e). He satisfies the statutory requirements.” *United States v. Talbot*, 78 F.3d at 1189. In the second appeal, Talbot renewed the argument, and the Seventh Circuit rejected it again. 107 F.3d 874, 1997 WL 73225, at *1.

For these reasons, the defendant’s motion for resentencing filed on February 15, 2006, is denied.

So ordered.

Date: _____

DAVID F. HAMILTON, JUDGE
United States District Court
Southern District of Indiana

Copies to:

Richard D. Talbot
Reg. No. #04895-028
Federal Correctional Institution
P.O. Box 5000
Greenville, IL 62246

Office of the United States Attorney
10 West Market Street, Suite 2100
Indianapolis, IN 46204-3048